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ARE THERE CONSTITUTIONALLY GUARANTEED LANGUAGE RIGHTS IN CRIMINAL CODE PROCEEDINGS?

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The courts of the province of Quebec conduct most of their business in the French language. Section 133 of the British North America Act,[1] however, provides in part,

> Either the English or the French language . . . may be used by any Person . . . in . . . any of the Courts of Quebec.

The courts of the provinces other than Quebec conduct most of their business in the English language. In the prairie provinces, however, it appears that there remain in force legislative provisions enacted by Parliament shortly after Confederation which form part of the constitutions of those provinces and which confer the same right on witnesses in their courts as does the portion of s.133 quoted regarding witnesses in Quebec courts.[2]

What is the nature of this right? It cannot be merely the right to answer questions as a witness in either English or French, which answers will then be translated into the language which the court normally uses. It must be the right to have the court before which the witness is testifying understand him directly, without the intervention of an interpreter. Thus the provisions must implicitly require courts capable of understanding both English and French.[3]

Let us assume that this constitutional right were repealed by the four provinces concerned as an exercise of their legislative authority to amend their own constitutions[4] or that the other six provinces amended their constitutions so as to include a provision restricting the right of witnesses before

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1 1867, 30 & 31 Vict., c.3(U.K.).

2 As to the constitutions of Alberta and Saskatchewan, see the Report of the Royal Commission on Bilingualism and Biculturalism, Vol. I, at 52, which refers to a federal statute of 1877 incorporated by reference into the constitutions of these two provinces when they were created in 1905. As to the constitution of Manitoba, a comparison of the wording of the Manitoba Act, S.C. 1870, c.3, s.23, and the Official Language Act, R.S.M. 1970, c.0-10, indicates that the latter statute's ancestor of 1890 did not attempt to remove the right of witnesses to use French orally in proceedings in provincial courts.

3 See *Miller & Kyling* v. *The Queen* (1970), 10 D.L.R. (3d) 785 (S.C.C.). *Quare,* whether this requirement also implicitly includes juries or merely refers to judges.

4 Section 92(1) of the B.N.A. Act, 1867, 30 & 31 Vict., c.3 (U.K.), would presumably allow this. As to Quebec's legislative authority in this matter, see the views of the Gendron Commission as reported in *Le Devoir,* February 14, 1973 at 18. In 1890, the Manitoba legislature repealed the constitutional right to use French in documents in provincial courts. See the Official Language Act, R.S.M. 1970, c.0-10.

their courts to the use of one language only.[5] Could Parliament impose or, in some cases, reimpose on those courts the duty to allow witnesses to testify in either English or French?

It might be possible for Parliament to do so as an exercise of its general power, if it were held that the matter of the language rights of witnesses in provincial courts, though traditionally a matter for the provinces, had achieved national importance.[6]

In the absence of this holding, it might be argued that Parliament had the authority to deal with the matter, at least insofar as it concerned federal proceedings in provincial courts, as an exercise of its power to legislate in respect of procedure in federal matters heard in provincial courts.[7] But would federal legislation of this sort be procedural in essence or would it rather be legislation in relation to the constitutions of the provinces or in relation to the constitution of their courts?[8] Since the conferring of language rights on witnesses in court proceedings necessarily imposes duties on those courts which may require a change in the nature of the people presiding in them, the question is a difficult one.[9]

Furthermore, Parliament is confronted by the prohibition against its amending "the Constitution of Canada . . . as regards the use of the English or French language . . .".[10] This prohibition's meaning is obscure, though, if it could divined, it might be found to prevent legislation of the sort suggested above. The B.N.A. Act, in s.133, now provides for the use of either English or French by witnesses in federal courts and it could be argued that to extend this right to witnesses in federal matters before provincial courts would amount to an amendment of "the Constitution of Canada."

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[5] See The Judicature Act, R.S.O. 1970, c.228, s. 127. *Quare*, whether this provision is a part of the province's "Constitution".

[6] This view of the matter was taken by Limerick, J.A., in *Reference re Official Languages Acts of Canada and New Brunswick* (1973), 5 N.B.R. (2d) 653 at 674 (N.B.S.C., App. Div.).

[7] See *Reference re Official Languages Acts, id.*, upholding, on this basis, the Official Languages Act, R.S.C. 1970, c.0-2, s.11. An appeal from this decision will be heard by the Supreme Court of Canada, *sub nom. Jones* v. *A.-G. Canada and A.-G. New Brunswick*. See *Supreme Court of Canada Bulletin*, January 12, 1973, at 3.

[8] This latter matter is assigned to the provincial legislatures by s.92(14) of the B.N.A. Act, 1867, 30 & 31 Vict., c.3 (U.K.).

[9] If the argument against federal legislative authority is accepted, ss. 555-56 of the Criminal Code, R.S.C. 1970, c. C-34, regarding the linguistic abilities of jurors in Criminal Code trials in Quebec and Manitoba may be *ultra vires*. But see *R.* v. *Preusantanz*, [1936] 2 D.L.R. 421 (Man. C.A.). If the argument is rejected, the following argument in this note will have been unnecessary unless the federal Official Languages Act were repealed.

[10] Section 91(1) of the B.N.A. Act, 1867, 30 & 31 Vict., c. 3(U.K.).

In the face of these obstacles to Parliament's legislating on language rights of witnesses in provincial courts, obstacles which may ultimately be found by the courts to be insurmountable, is there any way the result desired by Parliament can be obtained, assuming uncooperative provincial legislatures? It is submitted that, at least in respect of Criminal Code proceedings in the provincial courts,[11] there is an argument that can be made which would lead to the desired result. The argument does not depend on federal language legislation, but on a willingness on the part of the courts to make inferences from legislation of long standing, inferences of the sort they have previously been prepared to make.[12]

The argument has three parts: first, that Parliament can create federal, criminal courts; secondly, that as was mentioned above, s.133 of the B.N.A. Act provides,

> Either the English or the French language . . . may be used by any Person . . . in . . . any Court of Canada established under this Act . . .

The third part is that Parliament, in conferring jurisdiction to hear trials of charges under the Criminal Code on provincial courts, has transformed them for the purpose of exercising that jurisdiction into federal criminal courts so that the portion of s.133 just quoted is applicable in them.

First, can Parliament create federal criminal courts? Section 92(14) of the B.N.A. Act enables the provincial legislatures "exclusively" to make laws in relation to "the Constitution . . . of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." Does this provision looked at in isolation indicate an intention to repose in the provinces the exclusive power to create criminal courts? I submit that it does not. It only confers on the provinces the exclusive authority to create provincial courts, which courts are to be capable of exercising both civil and criminal jurisdiction. This in no way detracts from any potential Parliamentary power to create federal courts of criminal jurisdiction. The exercise of such an authority would in no way render the provincial authority nugatory, since the provinces would still be the only level capable of creating provincial courts.

What is the source of the Parliamentary authority to create federal criminal courts? It is s.101, which enables Parliament to provide "for the Establishment of any additional Courts for the better administration of the

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[11] The Code, R.S.C. 1970, c. C-34, confers jurisdiction on provincial courts. See s.2.

[12] The numbers of people of French mother tongue outside Quebec and of English mother tongue inside Quebec are almost equal. There are just less than 800,000 in each group. Statistics Canada, *News Release on Census '71*, April 24, 1972, at 3. All of these persons, those most likely to require the right for which I argue, would be aided by my argument if the provincial position ultimately prevails.

Laws of Canada."[13] Should the above interpretation of s.92(14) be incorrect and that provision be properly interpreted in isolation as intending to confer the authority to create all criminal courts on the provinces alone, its force would be overcome by that of s.101, which not only appears later in the statute, but, vastly more importantly, contains a *non obstante* clause.

It has been argued that s.91(27) in some way resolves this question on the side of the provinces, guaranteeing them exclusive authority to create criminal courts.[14] I would submit that this argument is misconceived. Section 91(27) provides

> . . . ([N]otwithstanding anything in this Act) the exclusive Legislative Authority of . . . Parliament . . . extends to . . . The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction . . .

It is submitted that this provision merely amounts to a recognition that Parliament's authority to create criminal courts is not exclusive. It does not imply that Parliament has no such power at all.

The view expressed above regarding Parliament's authority to create federal criminal courts has commended itself to courts,[15] commentators[16] and, indeed, to Parliament itself.[17] As Taschereau, J., said in *Valin* v. *Langlois*,[18]

> The constitution, maintenance and organization of Provincial Courts of criminal jurisdiction is given to the Provincial Legislatures . . . yet, cannot Parliament, in

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[13] It is interesting to speculate on the possibility that there is a difference in the meaning of the phrase "provide . . . for the Establishment of . . . Courts" in s.101 and the phrase "make laws in relation to . . . The Constitution . . . of . . . Courts" in s.92(14). Section 101 itself may suggest this. It declares that, with respect to "a General Court of Appeal for Canada," "Parliament . . . may . . . provide for . . . [its] . . . Constitution," —but that with respect to "Courts for the better Administration of the Laws of Canada," "Parliament may provide for . . . [their] . . . Establishment." The difficulty with this suggestion of a difference in meaning is that if "establishment" is not synonymous with "constitution", what can "establishment" mean? Presumably, the phrases are synonymous with each other and both connote the ability to create courts. See, e.g., the usage of "constitute" and "establish" in the *Shorter Oxford English Dictionary* (3d. ed. rev. with addenda). In any event, no court, so far as I know, has ever commented upon this curious difference in wording and, thus, s. 101 must be taken to allow Parliament to create courts just as s. 92(14) permits the provincial legislatures to create courts.

[14] See McDonald, *Constitutional Aspects of Canadian Anti-Combines Law Enforcement* (1969), 47 C.B.R. 161 at 220 ff.

[15] See *Valin* v. *Langlois* (1880), 3 S.C.R. 1 at 75; *R.* v. *Wipper* (1902), 5 C.C.C. 17 (N.S.S.C.) and *Ex p. Lebel* (1910), 16 C.C.C. 363 (N.B.S.C.). There are contrary *dicta* in two of the judgments in the Supreme Court of Canada in the *Board of Commerce* case, but the point was not dealt with by the Judicial Committee on appeal. See (1920), 60 S.C.R. 456, aff'd., [1922] 1 A.C. 191. These *dicta* did not refer to the comment in the *Valin* case or to the *Lebel* case (in which the *ratio* was that Parliament could create federal criminal courts).

[16] See Laskin, *Canadian Constitutional Law* (3d ed. rev. Toronto: Carswell Co., 1969) at 818. *Reference re Privy Council Appeals,* [1947] A.C. 127 is relied on. See particularly Lord Jowitt, L.C.'s comments in that case at 153.

[17] See the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 65 (Item 9), in which the Federal Court is constituted a criminal court for the purpose of certain proceedings under the Combines Investigation Act, R.S.C. 1970, c. C-23.

[18] *Valin* v. *Langlois, supra,* note 15 at 75.

> virtue of s.101 of the Act, create new courts of criminal jurisdiction and enact that all crimes, all offences shall be tried exclusively before these new courts? I take this to be beyond controversy.

To proceed with the more difficult part of the argument now, it is contended that any provincial court has been, when exercising jurisdiction under the Criminal Code, thereby established as a court of Canada under s.101 of the B.N.A. Act so as to render s.133 applicable therein.[19] Authority for this proposition is to be found primarily in the case of *Valin* v. *Langlois*, a portion of which has just been quoted, a decision of the Supreme Court of Canada. In that case it was held that Parliament, in conferring on provincial courts the jurisdiction to try actions with respect to controverted federal elections, had thereby created, respecting the exercise of that jurisdiction, federal courts.

Leave to appeal from this decision was denied by the Judicial Committee of the Privy Council.[20] Lord Selborne, who delivered the opinion of the Board on the application, stated[21] that it had been suggested

> . . . that it has seemed fit to the Parliament of Canada to confer the jurisdiction necessary for the trial of election petitions upon Courts of ordinary jurisdiction in the provinces, and it is said that although the Parliament of Canada might have provided in any other manner for those trials, and might have created any new Courts for this purpose, it could not commit the exercise of such a new jurisdiction to any existing Provincial Court. After all their Lordships have heard . . . , they are at a loss to follow that argument, *even supposing that this were not in truth and in substance the creation of a new Court.*

Thus the Judicial Committee agreed with the Supreme Court of Canada that, in conferring jurisdiction in federal election matters on provincial courts, Parliament had created them federal courts for the purpose of exercising such jurisdiction. It is submitted that, by using the method the Supreme Court of Canada did in the *Valin* case, one could come to the conclusion that in conferring jurisdiction in the Criminal Code on provincial courts, Parliament had thereby established them as federal courts under s.101 for the purpose of exercising that jurisdiction, in which case the language guarantee in s.133 would be applicable in them.

After all, let us note that the Criminal Code contains, as did the Elections Act in the view of Ritchie, C.J., in the *Valin* case,[22]

> all necessary and suitable provisions to enable them [the courts], and the judges thereof, effectually to exercise such jurisdiction, not only with reference to the principles, but also to the rules and practice by which they should be governed . . .

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[19] An argument of this sort was apparently made and rejected in *Ex p. Poulin* (1968), 69 D.L.R. (2d) 526 (B.C.S.C.), aff'd. (1968), 1 D.L.R. (3d) 239 (B.C.C.A.). The judgments, however, make no reference to the authorities which follow and so the decision may have been made *per incuriam* in any event.

[20] (1879), 5 App. Cas. 115.

[21] *Id.*, at 119, emphasis added.

[22] *Valin* v. *Langlois, supra,* note 15 at 30.

In the case of the election courts, the Chief Justice continued,[23]

> This is more especially noticable with reference to the enactments under the headings "interpretation clauses," "procedure," "jurisdiction and rules of court," "reception and jurisdiction of the judge," "witnesses," and the provision as to who may practice as agent or attorney, or as counsel in such courts in the case of such petitions, and all matters relating thereto before the court or judge.

The Criminal Code as well contains parts or sections dealing wholly or partly with all of the same matters.[24] Therefore, the conclusion argued for could reasonably be made.[25]

There are obviously difficulties with this argument which attempts to resolve a conflict caused by the federal use of provincial courts merely by elevating these courts above the struggle. Among them may be offered the suggestion that the wording of the Official Languages Act, Parliament's own attempt to resolve the problem of the language rights of witnesses in federal proceedings in provincial courts, appears not to contemplate that the transformation for which I have argued took place. In response to this, one might argue the impossibility of interpreting the intention of Parliament in 1892, when it first enacted the Code, by the use of legislation, perhaps *ultra vires* in any event, which it enacted in 1969. Yet this response, and others to further objections, do not in any way guarantee the acceptance of the argument, should it become necessary to make it. All that can be said is that if it were necessary to make it, its acceptance would not require the breaking of entirely new ground by the judiciary, that it would extend to all a right now available only to some and that it would guarantee this rather meagre right against provincial repeal.

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[23] *Id.*, at 31-32.

[24] See Criminal Code, R.S.C. 1970, c. C-34, especially Parts I, XII through XIX and XXIV.

[25] See also *R. v. Wipper, supra,* note 15, in which, relying on *Valin* v. *Langlois, supra,* note 15, it was held that Parliament, in conferring jurisdiction on provincially appointed justices of the peace to hear prosecutions under the Canada Temperance Act, had thereby established them as federal courts under s. 101 of the B.N.A. Act for the purpose of exercising that jurisdiction. See also a case comment by "B.L." (now Laskin, J., of the Supreme Court of Canada?), (1945), 23 C.B.R. 159. "In *The British Tradition in Canadian Law* (London: Stevens and Sons, 1969) at 114, the author, Laskin, J. A. (as he then was), declared that "provincial courts . . . endowed with federal jurisdiction . . . may be considered, *pro tanto,* as federal courts in so far as they administer federal law." If the argument I have made regarding the transformation of courts were accepted and if it were accepted that s.133 of the B.N.A. contemplates bilingual juries as well as courts, then the provisions of the Criminal Code referred to in note 9, *supra,* regarding the linguistic abilities of jurors are *ultra vires,* not for the reasons mentioned in the text accompanying note 9 but because they contravene s.91(1) of the B.N.A. Act by impairing the rights conferred by s.133.